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U.S. Bankruptcy Appellate Panel of the Tenth Circuit

October 25, 1999

Barbara A. Schermerhorn Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE DANIEL EVAN PETERSON, Debtor.	BAP No. KS-99-022
DANIEL EVAN PETERSON, Plaintiff–Appellant, v. STUDENT LOAN MARKETING ASSOCIATION, Defendant–Appellee.	Bankr. No. 90-13757 Adv. No. 97-5198 Chapter 13 ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court for the District of Kansas

Before McFEELEY, Chief Judge, BOULDEN, and CORNISH, Bankruptcy Judges.

BOULDEN, Bankruptcy Judge.

Daniel Evan Peterson, the Chapter 13 debtor (Debtor), appeals a judgment that determined that his student loan debts are nondischargeable. For the reasons set forth below, we REVERSE.

I. Background

On December 12, 1990, the Debtor filed for protection under Chapter 13 of the

* This order and judgment has no precedential value and may not be cited, except for the purposes of establishing the doctrines of law of the case, res judicata, or collateral estoppel. 10th Cir. BAP L.R. 8010-2.

Bankruptcy Code.[1] The Debtor's Schedule of Debts listed claims of $8,181.18 (Student Loans) in favor of Student Loan Servicing Center, claims that are now held by Student Loan Marketing Association, the defendant-appellee herein (Creditor). The Chapter 13 Plan (Plan) filed by the Debtor proposed to pay $30 each two-week pay period for three years from the date of confirmation, to be distributed to unsecured creditors on a *pro rata* basis after payment of priority claims. The Plan did not contain a statement regarding the dischargeability of any debts, and did not separately classify the Student Loans or even mention them, other than through the following statement:

> All unsecured creditors shall be paid in a manner that provides the same treatment for each claim within a particular class. The amount to be distributed to each unsecured creditor under the plan shall not be less than the value (as of the effective date of the plan) of the amount, if any, that would be paid such claim if the estate of the debtor were to be liquidated under Chapter 7 of Title 11 of the United States Code except as may be applied to the three student loan debts listed in the attached Schedule of Debts, as provided for in 11 U.S.C.A. §1325 and §1328.

Plan, p.3, ¶ 3.

No party in interest objected to the confirmation of the Debtor's Plan. The bankruptcy court entered an Order Confirming Plan (Confirmation Order) on February 22, 1991, and no creditor appealed the Confirmation Order. No party ever sought to modify the Plan.

The Debtor made his payments pursuant to the Plan to the Chapter 13 trustee and the Chapter 13 trustee, in turn, disbursed payments to the Debtor's unsecured creditors, including the Creditor. In 1994, upon completion of the payments due under the Plan, the bankruptcy court executed pursuant to 11 U.S.C. § 1328(a)[2] a Discharge of Debtor (Discharge Order), which provided that:

> the debtor be and hereby is discharged from all debts provided for by the plan or disallowed under 11 U.S.C. §502 except any debt

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[1] The facts, derived from a list of stipulated facts set forth in a Final Pretrial Conference Order, are not contested by the parties.

[2] Unless otherwise noted, all statutory references are to title 11 of the United States Code.

(1) provided for under 11 U.S.C. §1322(b)(5);

(2) of the kind specified in 11 U.S.C. §523(a)(5);

(3) based on an allowed claim filed under 11 U.S.C. §1305(a)(2) if prior approval by the trustee of the debtor's incurring such debt was practicable and was not obtained.

Discharge Order, p.1. The Discharge Order, which was served on the Creditor, did not except the Student Loans from discharge, or reference §§ 523(a)(8) or 1328(a)(2). The Creditor took no action to revoke, amend, clarify, or appeal the Discharge Order. The Debtor's Chapter 13 case was subsequently closed.

Approximately six months after the Discharge Order was entered, the Debtor received payment books from the Creditor requesting that payments be made on the Student Loans. From October 1995 to February 1997, Debtor's counsel requested that the Creditor cease its collection efforts based on the Discharge Order.

In May 1997, upon a motion by the Debtor, the bankruptcy court reopened the Debtor's Chapter 13 case, and the Debtor thereafter commenced an adversary proceeding seeking a determination that the Student Loans were discharged under the Plan, the Confirmation Order, and the Discharge Order. A Final Pretrial Conference Order (Pretrial Order) entered by the bankruptcy court placed the issue of whether the Creditor was precluded from collecting or attempting to collect the balance of the Student Loans by virtue of the Debtor's Chapter 13 proceeding and the Discharge Order squarely before the bankruptcy court. The Pretrial Order recites the Creditor's contention that the Discharge Order form issued was void to the extent it ordered something that the bankruptcy court did not have jurisdiction to do. Pretrial Order, p.38. From the record before us, it does not appear that the Creditor argued or offered evidence to show that the discharge of the Student Loans provided in the Discharge Order was a clerical mistake.

After a trial,[3] the bankruptcy court ruled from the bench that the Student Loans were not discharged because the confirmed Plan "simply contains a generic discharge provision." Transcript dated December 22, 1998, p.7.[4] The bankruptcy court reasoned that the Student Loans were not discharged pursuant to §§ 523(a)(8) and 1328(a)(2) because discharge was only possible upon a showing of undue hardship. *Id*. The bankruptcy court did not address the inconsistency between its determination that the Plan did not provide for a discharge of the Student Loans,[4] and the clear language of the Discharge Order that did. Nor was there any ruling that the Discharge Order was capable of amendment as a result of mistake or upon any other ground. The subsequent Judgment of Non-Dischargeability (Judgment) entered by the bankruptcy court stated, without explanation, that the Student Loans were not discharged under the Discharge Order. The Debtor filed a timely appeal of the Judgment with this Court, and the parties have consented to this Court's appellate jurisdiction. *See* 28 U.S.C. §§ 158(a)(1) and (c)(1); Fed. R. Bankr. P. 8001(a) and 8002(a); 10th Cir. BAP L.R. 8001-1.

II. Standard of Review

It is well-settled that "[f]or purposes of standard of review, decisions by judges are traditionally divided into three categories, denominated questions of law (reviewable *de novo*), questions of fact (reviewable for clear error), and matters of discretion (reviewable for 'abuse of discretion')." *Pierce v. Underwood*, 487 U.S. 552, 558 (1988). The only issue in this case is whether the Student Loans were discharged under the Plan, Confirmation Order, Discharge Order and applicable law. The parties do not

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[3] The Debtor argued before the bankruptcy court that the Student Loans should be discharged as an undue hardship under § 523(a)(8). The parties have not raised this issue on appeal. The Debtor also argued that the bankruptcy court should discharge the Student Loans under § 105, but the bankruptcy court expressly refused to do so. On appeal, the Debtor does not contend that the bankruptcy court erred in so ruling, but rather maintains that this Court should consider discharging the Student Loans, or lessening his financial burden thereunder, pursuant to our alleged § 105 equitable powers. Given our ruling herein, we need not consider this issue.

[4] We can find no specific discharge provision in the Debtor's Plan.

dispute the facts upon which the bankruptcy court made its decision. The only issue in this appeal is whether, given those undisputed and stipulated facts, the bankruptcy court erred as a matter of law in concluding that the Student Loans were nondischargeable. We review this question of law *de novo*, making an independent determination of the issue, and giving no special weight to the bankruptcy court's decision. *Salve Regina College v. Russell*, 499 U.S. 225, 238 (1991); *United States v. First City Nat'l Bank*, 386 U.S. 361, 368 (1967); *Andersen v. UNIPAC-NEBHELP (In re Andersen)*, 179 F.3d 1253, 1255 (10th Cir. 1999).

III. Discussion

The bankruptcy court held that the Student Loans were not discharged because §§ 523(a)(8) and 1328(a)(2)[5] so provide, and the Debtor's Plan and the Confirmation Order did not provide otherwise. In so holding, the bankruptcy court distinguished this case from *Andersen v. Higher Ed. Assistance Found. (In re Andersen)*, 215 B.R. 792 (10th Cir. BAP 1998), which has since been affirmed by the Tenth Circuit. *Andersen*, 179 F.3d at 1253. In *Andersen*, the Tenth Circuit held that student loan debts were discharged because the debtor's plan expressly provided that the entry of a confirmation order constituted a finding that exception of the student loans from discharge would impose undue hardship on the debtor. *See* § 523(a)(8). Because the creditor in *Andersen* failed to object to the confirmation of the debtor's plan or appeal the confirmation order, the confirmation order was *res judicata* as to the

[5] Section 1328(a)(2), which was applicable at the time that the Debtor filed his Chapter 13 case, provides: "As soon as practicable after completion by the debtor of all payments under the plan, . . . , the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except any debt -- . . . (2) of the kind specified in paragraph . . . (8) . . . of section 523(a) . . . of this title." 11 U.S.C. § 1328(a)(2). The Student Loan Default Prevention Initiative Act of 1990, which was part of the Omnibus Budget Reconciliation Act of 1990, Pub L. No. 101-508, 104 Stat. 1388 (effective November 5, 1990), added § 523(a)(8) to the list of debts excepted from discharge under § 1328(a)(2). This Act contained a sunset provision that was repealed by the Higher Education Amendments of 1992, Pub. L. No. 102-325, 106 Stat. 448 (July 23, 1992), thereby making the § 523(a)(8) exception to discharge permanently applicable to Chapter 13 cases.

dischargeability of the student loans.

Unlike *Andersen*, in which the issue was whether confirmation of the plan constituted a binding adjudication of hardship, the issue before us in this case is how to reconcile the bankruptcy court's decision that the Student Loans were not discharged because the Plan contained "a generic discharge provision" and the specific language of the Discharge Order. Even were we to affirm the bankruptcy court's analysis of §§ 523(a)(8) and 1328(a)(2) as it applies to the language of the Plan, the bankruptcy court must be reversed because it did not discuss the effect of the conflicting Discharge Order. The Discharge Order states that "the debtor be and he hereby is discharged from all debts provided for by the plan." Discharge Order, p.1. It goes on to except specific debts from the Debtor's discharge, but in that list of exceptions, neither the Student Loans nor debts excepted from discharge under § 523(a)(8) are mentioned. The Discharge Order in unambiguous language discharges the Student Loans.

It is uncontested that "[s]aid order of Discharge was served upon all creditors including the [Creditor]. The Student loan debts were not excepted from discharge by said discharge order and no action has been filed to revoke said discharge order. The time has expired to file any such action." Pretrial Order, ¶ 6.G. The Creditor was served with the Discharge Order, and failed to appeal it, or to timely seek its modification or revocation. As such, it is bound by the express terms of the Discharge Order. *Cf. Andersen*, 179 F.3d at 1256-57 (failure to raise issue related to the dischargeability of a student loan debt must be raised in a timely fashion and failure to do so results in the dischargeability of the debt); *American Bank & Trust Co. v. Jardine Ins. Servs. Tex., Inc. (In re Barton Indus., Inc.)*, 104 F.3d 1241, 1246 (10th Cir. 1997), *cited in Andersen*, 179 F.3d at 1257 (creditors are obligated to take an active role in protecting their claims).

The Creditor contends that the Discharge Order was entered in error and "requests leave to file a motion to correct the clerical error in the discharge order

pursuant to Fed. R. Civ. P. 60(a), as incorporated by Bankruptcy Rule 9024."[6] Appellee's Brief, p.5. We have no record of this motion being raised below, and this Court may not entertain such a motion on appeal. The content and viability of the Discharge Order was clearly before the bankruptcy court, and had the Creditor wished to pursue this course of defense, it should have been raised below.

The Creditor also points to *DePaolo v. United States (In re DePaolo)*, 45 F.3d 373 (10th Cir. 1995), and *Grynberg v. United States (In re Grynberg)*, 986 F.2d 367 (10th Cir. 1993), *cert. denied*, 510 U.S. 812 (1993), for the proposition that creditors whose claims are nondischargeable pursuant to the Bankruptcy Code are not barred by a confirmed plan from collecting those debts. Neither *DePaolo* nor *Grynberg* involve an order similar to the Discharge Order in this case.

Finally, the Creditor contends that the Discharge Order should have no effect because the bankruptcy court did not have the power to enter it as it is contrary to §§ 523(a)(8) and 1328(a)(2). This very argument was rejected by the Tenth Circuit in *Andersen*, where the creditor argued that the bankruptcy court did not have the authority to confirm a plan that provided for the discharge of otherwise nondischargeable student loans. The Tenth Circuit explained that although the student loans in *Andersen* were discharged in a manner that was inconsistent with the Bankruptcy Code, the discharge was allowable because the creditor did not "take an active role in protecting its interests," and therefore it was in a "poor position to later complain about an adverse result." 179 F.3d at 1257. The Tenth Circuit further stated that an order "is not rendered void merely because a certain provision of the plan may be inconsistent with, or even contrary to, the [Bankruptcy] Code." *Id*. at n.8. It also determined that, although the confirmation order in *Andersen* was contrary to the Bankruptcy Code, it was nonetheless *res judicata* as

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[6] We take no position as to whether relief from the Discharge Order could have been granted pursuant to Fed. R. Bankr. P. 9024, which incorporates Fed. R. Civ. P. 60(a), under the facts of this case.

to the issue of "undue hardship" or the dischargeability of the student loans in question as the creditor did not timely contest it. *Id*. at 1258-59.

Similar to *Andersen*, the Creditor was served with the Discharge Order, the Discharge Order did not except the Student Loans from discharge, and the Creditor did not timely contest the Discharge Order in any way. Given these facts, although the Discharge Order contains provisions arguably contrary to the Bankruptcy Code, the Creditor is not in a position to contest the bankruptcy court's authority to enter it.

IV. Conclusion

For the reasons set forth above, the bankruptcy court's judgment is REVERSED.